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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 599

FRANK CIOFALO,

*Petitioner,*

—v.—

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK OR TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

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Petitioner, Frank Ciofalo, prays that a writ of certiorari issue to review either or both, as may be jurisdictionally necessary or proper, the order of the Court of Appeals of the State of New York described *infra,* or the order and judgment of the New York Supreme Court, Appellate Division, Third Department, described *infra.*

## Opinions Below

The opinion of the New York Supreme Court, Appellate Division, Third Department, printed in Appendix C hereto *infra,* is reported in 23 A.D. 2d 926, 258 N.Y.S. 2d 881.

The Court of Appeals of the State of New York, in denying leave to appeal (Appendix A hereto, *infra*), rendered no opinion.

## Jurisdiction

The order of the Court of Appeals of the State of New York here (alternatively) sought to be reviewed was entered on June 10, 1965 (Appendix A hereto, *infra*). That order denied an application by the within petitioner for leave to appeal from the order and judgment of the New York Supreme Court, Appellate Division, Third Department, entered May 13, 1965 (Appendix B hereto, *infra*) which had dismissed a petition (by the within petitioner) under Article 78 of the Civil Practice Law and Rules of New York and §6515 of the Education Law of New York (RR 3 et seq*) to review and annul a determination by the Board of Regents of the University of the State of New ork revoking petitioner's license to practice medicine, and which order and judgment of the Appellate Division had confirmed the Board's determination. By order of Mr. Justice Harlan the time for filing this petition for certiorari has been extended to and including September 23, 1965. In order to avoid jurisdictional doubt as to whether, technically, review in this Court would be addressed to the order of the Court of Appeals or to the order and judgment of the Appellate Division, or to both, we are formulating our jurisdictional request in the alternative. The jurisdiction

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* "RR " refers to the printed "Record For Review" which petitioner filed in the Appellate Division in the "Article 78" proceeding which he instituted in that Court to review the determination of the Board of Regents. Except as noted *infra*, all of the items not printed in the latter Record to which reference needs to be made herein are printed in the Appendix hereto, *infra*. The certified Record which we are filing with the Clerk of this Court consists of the above mentioned printed "Record For Review" plus the subsequent proceedings in the Appellate Division and the Court of Appeals. Nine extra copies of the Record For Review are filed herewith.

of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Sixth Amendment (right to counsel) and the Fourteenth Amendment (due process of law, equal protection of the laws, right to counsel) of the Constitution of the United States.

## Question Presented

Was petitioner, a physician, denied due process of law, equal protection of the laws* and the right to counsel in that his disciplinary trial before the Board of Regents was conducted in his absence and in the absence of his counsel, these absences having been necessitated by the fact that petitioner's counsel was unable to be present at the disciplinary trial because of another engagement under Court direction? Was the refusal to adjourn the matter for the short period needed by petitioner's counsel arbitrary, i.e., was it unjustified by the fact that there had been prior adjournments, in view of the facts (1) that the Board had itself waited nearly two years before instituting the disciplinary proceeding, (2) that petitioner's counsel had unique knowledge of the case having represented petitioner from the commencement of the latter's troubles three years earlier, and (3) that petitioner's counsel is an exceptionally busy practitioner upon whose services petitioner felt peculiarly dependent in this matter which meant professional life or death for petitioner? Has petitioner accordingly been deprived of his profession without a hearing and under such circumstances that he may not be said to have waived his right to be heard?

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* The equal protection formulation was not invoked in the proceedings below. See p. 20, *infra*.

## Constitutional and Statutory Provisions Involved

The case involves the Fourteenth Amendment due process and equal protection clauses in conjunction with the Sixth Amendment protection of the right to counsel. It also involves Sections 6514 and 6515 of the New York Education Law; the pertinent portions of these statutes are quoted in Appendix D hereto, *infra.*

## Statement of the Case and of How the Federal Questions Are Presented

Petitioner, a New York State licensed physician since 1931 who had an extensive practice in obstetrics and gynecology, was indicted in 1961 by a New York State Grand Jury for abortion (RR 3-4, 76).* A year later, upon consent by the State that seventeen of the twenty-seven counts of the indictment be dismissed under a motion to suppress for unreasonable search and seizure, those seventeen counts were dismissed, and as to the remaining ten counts the motion for suppression was denied without prejudice and with leave to the defendant to make further appropriate motions for the relief sought.** Soon after that the

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* At RR 4 the year of the indictment is erroneously given as 1962; see RR 76.

** While the present certified Record before this Court does not contain the above mentioned proceedings on the motion to suppress, we are nevertheless alluding to those proceedings because the Record herein may be taken (we respectfully suggest) as presumptively incorporating the entire prior record in the criminal proceedings since one principal charge in the disciplinary proceeding here directly involved consisted of the record of the conviction on petitioner's 1962 plea of guilty (*infra*) to a single count of the 1961 indictment (RR 71, 76). The order granting the motion to suppress in the criminal proceeding was entered June 13, 1962, Court of General Sessions, County of New York,

criminal case came to an end when the defendant pleaded guilty to assault in the third degree under a single misdemeanor count of attempted abortion, this plea cover-

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Postel, J., *The People of the State of New York against Frank Ciofalo,* Indictment No. 2155–61. Our reason for alluding to the suppression order in the criminal case is that one of the consequences of petitioner's counsel's having been denied the opportunity to appear in the within disciplinary proceeding was that petitioner thereby in turn lost the opportunity of his counsel's becoming more attentively alerted to the fact that two of the four women abortion complainants in the disciplinary proceeding had been the subjects of counts of the indictment which were suppressed on grounds of unlawful search and seizure in 1962 (*infra*). We realize that we are precluded here from raising the issue, as such, of the legality of the use of this tainted evidence in the disciplinary proceeding, because such issue was not litigated in the within proceedings below. The issue which we do raise here in relation to the suppression order and the use of tainted evidence in the disciplinary proceeding is, again, that the due process questions presented by the conducting of the disciplinary proceeding in the absence of petitioner and his counsel require, for their proper and full evaluation, a consideration of the factor of counsel's having been denied the opportunity of meeting the tainted evidence issue in the actual setting of the disciplinary trial session where the issue would have been more likely to engage the attention of petitioner and his counsel. As to the remaining two of the four women complainants at the disciplinary proceeding, who were among those involved in the ten non-dismissed counts of the 1961 indictment, there lurked in the case an issue of illegal wiretapping or electronic eavesdropping (*infra*); Judge Postel's order (*supra*) upon the motion to suppress had reserved the defendant's right to move for further appropriate relief as to the ten non-dismissed counts of the indictment, as above recited. As to the issue, as such, of the use of tainted evidence in the within disciplinary proceeding—the issue which did not emerge in the instant proceeding below and is not presented or being tendered by us here—we are reserving the right to institute appropriate proceedings to litigate that issue before the Board of Regents or the State Courts. We think that this does not impair the jurisdictional finality of the case at the present juncture for purposes of certiorari in this Court, for on the present record the due process issue of denial of hearing and of the right to counsel in the disciplinary proceeding is adequately presented, we submit. In short, while we want this Court to know the tainted evidence background for

ing the entire indictment, and the defendant received a suspended sentence (RR 71, 76). About two more years now went by, and in 1964 disciplinary proceedings were first instituted, on the basis of the above mentioned misdemeanor conviction and of charges of abortion committed upon four of the same women involved in the 1961 indictment (RR 70-73). As mentioned in our last preceding footnote, two of these four women were the subjects of counts of the indictment which had been suppressed for unlawful search and seizure, and as to the other two women the defense in 1961-1962 had intended to move further for suppression on grounds of illegal wiretapping or electronic eavesdropping. None of these four women had been the subject of the single misdemeanor count to which the defendant pleaded guilty of third degree assault in 1962.

Prior to the abortion charges here involved petitioner had an unblemished career history (RR 4).

The disciplinary proceedings were commenced on notice to petitioner on or about April 17, 1964, for hearing to

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its bearing on the within certiorari issue of denial of a due process hearing and assistance of counsel, we are also trying to be as candid as possible in announcing our likely intention of seeking relief at State level on the tainted evidence issue as such (the legality of the use of the evidence) whether certiorari is granted herein or not; and against the eventuality that certiorari may be denied, we have wanted this rather long explanatory note to be "on record", so that, if and when we move at State level in regard to the tainted evidence issue itself, we may properly be in a position to claim that that issue was not presented in the present certiorari proceeding except insofar as it relates to the issue of denial of a due process hearing in the disciplinary proceeding, i.e., as denoting that the conducting of that "hearing" in the absence of petitioner and his counsel worked, *inter alia*, a denial or a diminution of petitioner's opportunity to have litigated the tainted evidence issue in that proceeding.

be held May 13, 1964. Petitioner promptly retained the same attorney (Maurice Edelbaum) who had represented him in the criminal proceedings in 1961-1962 (RR 5). On May 6, 1964 Mr. Edelbaum applied for adjournment of the May 13 hearing on the ground that he was away on a doctor-ordered rest and would be engaged in another trial on his return; this application was routinely granted and the disciplinary hearing was adjourned to June 9, 1964 (RR 5). On June 9, 1964, attorney Maurice Edelbaum being actually engaged in a trial, his son and office associate, Philip R. Edelbaum, appeared and requested an adjournment until the Fall of the year, advising the Grievance Subcommittee that Maurice Edelbaum was scheduled for trial engagements through July (RR 20). The Assistant Attorney General assigned to the disciplinary proceeding (Mr. Nack) insisted, without giving reasons, that the case must proceed expeditiously and that if the application for adjournment were granted a trial date be set peremptorily; the Grievance Subcommittee granted the motion for adjournment, the Chairman adding (RR 21):

> "* * * However, commenting on the remarks of the Attorney General, it is true that this case has already been adjourned and postponed.* Consequently, on or about June 18th a date will be set in the early part of September and we request counsel to make all attempts to be present and prepared to go through with the hearing."

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* We note that this referred to the single previous *routine* adjournment which had been granted without question on counsel's application based upon his health needs and other trial engagements—and that the disciplinary authorities had had nearly two years in which to commence these proceedings.

When Mr. Philip Edelbaum then asked if the later part of September would be agreeable inasmuch as his father would be on vacation, Assistant Attorney General Nack at first said "No objection. Sometime after the 15th" (RR 21). But a moment later Mr. Nack, evidently reverting to that conditioned-reflex zeal which our profession seems to inculcate in its practitioners as a self-protective device against "making any concessions", requested the Grievance Subcommittee to direct counsel "that the case must proceed on the date which will be fixed. If counsel, Mr. Edelbaum, is otherwise engaged that the respondent engage other counsel" (RR 21), and the Subcommittee Chairman, apparently taking no time for reflection or consultation, responded that "the Committee so directs" (RR 21).

It is important to perceive that it was in this short (barely one and one-half pages—RR 20-21) and perfunctory-toned colloquy before the Grievance Subcommittee on June 9, 1964, when the whole disciplinary case was not two months old and only a single unquestionably justified adjournment had been had for the perfectly normal purpose of accommodation of a busy legal practitioner who moreover was uniquely the counsel needed and wanted by a client facing a catastrophe less dire (if at all) only than the loss of life or physical liberty—it was in this ramrod colloquy setting of June 9, 1964 where the atmosphere of bureaucracy breathes through every line of the transcript (RR 20-21), that the time-scheduling "law of the case" in this matter became lodged, with the subsequent arbitrary consequences described *infra*.

The hearing was set down for September 15, 1964 (RR 22 et seq.). Petitioner's counsel, Maurice Edelbaum—who

we may here advise the Court* was not prepared by anything in his long experience as a lawyer to expect that the Grievance Subcommittee's direction of June 9, 1964 must under all and any conditions remain unyielding—had become actually engaged in a trial which was under way on September 15, 1964 (RR 23). Another of Mr. Edelbaum's office associates, Mr. Abrams, appeared before the Grievance Subcommittee on September 15, 1964, and advised that Mr. Edelbaum's then trial engagement was expected to continue for a week or ten days, that Mr. Edelbaum was furthermore under Court direction to commence a murder trial on September 21 which was expected to take about three weeks, and that it was therefore requested that the disciplinary proceeding be put over to a date in October (RR 23). Assistant Attorney General Nack objected to any adjournment beyond two weeks on the ground that "this case has been on * * * a few times before" ** and that the last adjournment had been granted subject to a peremptory direction (RR 23-24). There followed a colloquy (RR 24-25) in which Mr. Edelbaum's associate (Mr. Abrams) *gave unequivocal assurance that if an October date was granted Mr. Edelbaum would appear,* and nevertheless the Grievance Subcommittee, under intensified goading by the Assistant Attorney General, scheduled the hearing for September 29 on an ultimatum basis.

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* The same Maurice Edelbaum is petitioner's counsel in this petition for certiorari.

** Again we note, there had been just two prior adjournments, one, unquestioned, on the grounds of Mr. Edelbaum's health and other engagements, and the second for the summer period which the Grievance Subcommittee itself had hardly demurred at except under the zeal-oriented goading of the Assistant Attorney General as above described.

When the "ultimatum" date of September 29, 1964 arrived, petitioner's counsel Maurice Edelbaum, being still unavoidably caught in that pressure of actual trial engagements of which the Grievance Subcommittee had been so earnestly informed on September 15, made a supreme exertion to save the situation for his client.* Mr. Edelbaum's associate, Mr. Abrams, appeared before the Grievance Subcommittee on September 29 and read into the record the following affidavit of Mr. Edelbaum (RR 28, 77-78):

> "MAURICE EDELBAUM, being duly sworn, deposes and says: That your deponent is the attorney for Dr. Frank Ciofalo in the above entitled matter.
>
> That on September 15, 1964, the last date that the within matter appeared upon the calendar of the Committee on Grievances for hearing, your deponent was actually engaged on trial in the Supreme Court of the State of New York, County of New York before Mr. Justice Sarafite and a jury, in the case of People v. Lombardi, et ano.
>
> That the said Lombardi case concluded by the jury returning a verdict on Friday, September 25, 1964. That during the course of the Lombardi case, your deponent, who is counsel to a defendant charged with the crime of murder in the first degree in the Supreme Court of Kings County (People v. Noble) was directed to commence the Noble case immediately upon the conclusion of the Lombardi case.
>
> That your deponent is now actually engaged in the trial of the said Noble case before the Honorable John R. Starkey Justice of the Supreme Court, Kings County, and a special blue ribbon jury panel.

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* Who, as we show *infra*, was insisting more desperately than ever that he had to have Mr. Edelbaum's personal services in this grave disciplinary matter.

That the Noble case is a retrial of a case originally tried two and one-half years ago, which was reversed by the Court of Appeals of the State of New York and sent back for a new trial.

That the defendant Noble has been incarcerated in jail all during said time, awaiting the instant retrial. That it is expected that the Noble case will take approximately two weeks from the date hereof to conclude.

Under the circumstances, your deponent submits the within affidavit of actual engagement for the purpose of obtaining one last adjournment of the within hearing and makes the following commitment to the Committee on Grievances, i.e., that no matter whether or not your deponent is actually engaged on trial on the date that the within Ciofalo hearing is adjourned to, he will make all necessary arrangements with whatever Court he is engaged, to be present at said hearing before this Committee and represent Dr. Ciofalo.

WHEREFORE, it is respectfully requested that the within hearing be adjourned to the date of the Committee's next meeting during the month of November 1964.

(Sworn to by Maurice Edelbaum on September 28, 1964.)"

In reading the above affidavit to the Grievance Subcommittee Mr. Abrams clarified that the reference to a November date in the affidavit was an inadvertence and stated that Mr. Edelbaum "*had requested the date of October 22 at which time he will without fail make himself available*" (RR 28). Mr. Abrams further stated that "Dr. Ciofalo insists upon having Mr. Edelbaum, and nobody else, represent him at this hearing" (RR 28), adding (RR 28-29):

> "Mr. Abrams: I would like to say one thing. Since the last time the matter was on the calendar for this Committee, he has spoken to Dr. Ciofalo and explained to him the commitment of the court. He has suggested to Dr. Ciofalo that perhaps he might obtain another counsel to represent him here. Dr. Ciofalo has refused to do so. He insists upon Mr. Edelbaum representing him. He doesn't have sufficient time for another attorney to come in here and fully prepare to adequately represent him before this Committee."

The Assistant Attorney General opposed further adjournment, treating the Grievance Subcommittee to what we must say was a tendentious recital of the "history" of the prior adjournments (RR 29-31), from which we shall quote the following single item:

> " • • • At that time [the June 9, 1964 colloquy] • • • it was pointed out that the case had been dragging an unusually long period of time, and after a great deal of discussion a [peremptory] date in September was fixed • • • ." •

Immediately following the Assistant Attorney General's statement, the Grievance Subcommittee Chairman announced that the case must proceed then and there, whereupon the petitioner himself asked to be heard (RR 31):

> "Dr. Ciofalo: Mr. Edelbaum has been my attorney of record. He knows my case and I have great con-

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• As earlier noted, as of June 9, 1964 the case had barely commenced, yet the Assistant Attorney General was now telling the Committee that as of that time "the case had been dragging an unusually long period of time"; as also earlier noted, the June 9 discussion had been short, indeed perfunctorily so, yet the Assistant Attorney General was now telling the Committee that the fixing of the peremptory September date had been done "after a great deal of discussion" on June 9.

> fidence in him. It is not my fault. I was ready at any time. He has never been available because he has been such a busy lawyer. It's no one's fault. Nobody is going to be hurt until I get him down here. My license is at stake, my future, and my reputation. I think I am entitled to one more adjournment when he promised me the next time he would eliminate everything else and come here and defend me. It isn't fair I should be tried without counsel."

As the Subcommittee adhered to its position, Mr. Abrams (Mr. Edelbaum's associate) stated that Dr. Ciofalo was unprepared to proceed, and that he (Mr. Abrams) was there only for the purpose of making the application for adjournment (RR 32). The Assistant Attorney General then offered that the State would put in its case and that Dr. Ciofalo put in his defense at an adjourned date, to which Mr. Abrams responded that this would not give Dr. Ciofalo the opportunity for cross examination of the adverse witnesses by his counsel (RR 32). Mr. Abrams also said (RR 32-33):

> "I would like to point out an affidavit of that nature, of actual engagement in a trial as serious as a murder trial, is recognized in every Court of this State and I suggest and I strongly urge it should be recognized here. This man is entitled to counsel of his own choosing.
>
> We are asking for one final adjournment at which time Mr. Edelbaum would put aside all his other commitments. *He has made a firm commitment in writing to this Committee in a sworn affidavit. What more can we do?*" (Emphasis supplied)

The Subcommittee remained unmoved (RR 33) and then the Assistant Attorney General (still not content), inter-

jected into the picture the idea that Dr. Ciofalo had somehow inexcusably failed to utilize an opportunity for assistance from another attorney, a Mr. Sanders (RR 33). Dr. Ciofalo explained this to the Subcommittee (RR 34):

> "Dr. Ciofalo: Even if I did get a new counsel now, he wouldn't know anything about the case. Mr. Sanders is just a friend; that's all. I spoke to him about it; that's why he called you at that time. If he took the case, which I don't want him to, from Mr. Edelbaum, he doesn't know anything about the case. It would take him a couple of weeks at least to familiarize himself with the record. We are not trying to get away with anything. We just want a little more time, because Mr. Edelbaum promised me next time he would definitely come down here and defend me and I am sure Mr. Edelbaum is preparing his case properly.
>
> *I know we can win this case, but if you go without Mr. Edelbaum and without an attorney—he advised me not to go ahead with the case at all.* I can't act as attorney; I don't know the law. Otherwise, I am ready any time to go on trial and I haven't even subpoenaed any of my witnesses." (Emphasis supplied)

The Subcommittee Chairman, upon the Assistant Attorney General's again urging that "We would like to commence with Petitioner's case", flatly ruled, "It is so ordered. Let's begin the Petitioner's case" (RR 34), whereupon Mr. Abrams stated, "Dr. Ciofalo and myself will have to leave. We cannot participate in such a purported trial. Excuse us" (RR 34). Thereupon Mr. Abrams and Dr. Ciofalo left the hearing room (RR 34).

The "trial" of Dr. Frank Ciofalo on the disciplinary charges then proceeded without more ado (RR 33-66). The

hearing was ordered concluded after the proof against Dr. Ciofalo had been introduced (RR 66). "In due course", the Grievance Subcommittee determined that the charges were sustained (October 1, 1964)* (RR 79-86); the full membership of the Grievance Committee (twelve additional physicians, the Subcommittee consisting of three physicians) approved the determination on the same day on which the Subcommittee's determination was presented for their "consideration" (October 8, 1964—RR 87-89); Dr. Ciofalo under date of November 5, 1964 was given a written notice from the State Department of Education that the Board of Regents Committee On Discipline would consider the recommendation of the Grievance Committee on December 1, 1964 (RR 10-11), and Dr. Ciofalo with Mr. Abrams appeared before the Regents' Committee on December 1 and fruitlessly requested a remand to the Grievance Subcommittee (RR 93); on December 17, 1964 the Regents' Committee accepted the determination of the Committee On Grievances revoking Dr. Ciofalo's license (RR 90-94); and the following day the full Board of Regents likewise accepted the determination of the Grievance Committee and ordered the license revoked (RR 95).**

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* The determination bears formal date of October 8, 1964, but it is evident from the date of October 1, 1964 alongside the signature of one of the three sub-committee members (RR 86) that the determination was actually reached on the latter date—in other words barely twenty-four hours after the conclusion of the "trial".

** There were no stenographic minutes made, our inquiry has disclosed, of the decisional discussions or meetings of the Sub-Committee on Grievances, the full Committee On Grievances, the Board of Regents Committee, or the full Board of Regents. We mention this as further instancing the atmosphere of procedural perfunctoriness which tends to surround disciplinary proceedings of this grave character under what is apparently the prevailing practice in this field in the present era in the State of New York.

In his proceeding for court review of the determination of the Board of Regents—the "Article 78" type of proceeding provided by the New York statutes for such purpose—petitioner urged before the New York Supreme Court, Appellate Division, Third Department, that *inter alia,* he had been denied due process and his right to counsel through being denied one additional adjournment on September 29, 1964 (Petitioner's Brief in the Appellate Division, Point I, pp. 8-15). The Appellate Division, in affirming the determination of the Board of Regents, noted the chronology of the adjournments, noted also that petitioner had been offered an opportunity on September 29, 1964 to produce his own witnesses at a later date, and concluded that "As to the petitioner's contention that refusal to grant a fourth adjournment deprived him of due process, comment, in the light of the circumstances, would seem unnecessary" (Appendix C hereto, *infra*).

In petitioner's application for leave to appeal to the Court of Appeals of the State of New York from the order and judgment of the Appellate Division, it was likewise urged, *inter alia,* that the refusal to grant a continuance under the circumstances violated petitioner's rights to due process (see the Affidavit of Frank Ciofalo in the Court of Appeals, sworn to May 25, 1965, p. 4, certified copy filed herewith as part of the certified record). The Court of Appeals on June 10, 1965 denied leave to appeal, without opinion (Appendix A hereto, *infra*).

The order of revocation of petitioner's license has gone into effect and he is not practising his profession.

## REASONS FOR GRANTING THE WRIT

In this case where a physician has been professionally destroyed without a hearing, and where he was prepared to be present and to contest vigorously the proofs against him and to maintain his innocence of the abortion charges* if he had been given a fair opportunity to do so with counsel of his choice, everything turned in the proceedings below on the theme that petitioner should not be given one final adjournment and that he should be forced to trial even if it had to be done without his being represented by counsel at all or indeed without his being present at the "trial" at all. For the State administrative bodies and Courts below to have resolved this question against petitioner was something that could not but arouse the gravest constitutional concern, one would have thought. Yet, it seems that at every stage of this matter in the proceedings below no serious constitutional concern at all was experienced by the several tribunals. We think it must be said, in all respectfulness, that the several tribunals below profoundly misevaluated the constitutional due process import of what they respectively did or approved in this case.

Due process of law varies with circumstances, and on the peculiar facts of this case there has been a misapprehension until now as to what due process here required. How could the public interest conceivably have been harmed if the disciplinary proceeding had gone over for another three weeks to the date when petitioner's counsel had made assurance *under oath* that he would absolutely appear? It was simplistic, Draconic, to measure out the

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* Not to mention again the tainted evidence issues which were swept into the unconstitutional procedural limbo.

due process *quanta* here on the merely arithmetical basis of the number of prior adjournments and their time-span. Quantity should not have been the test here. Due process required a qualitative evaluation of the situation. But what most forcibly strikes one's mind in reading the instant record is that there appears to have been literally no such qualitative evaluation at all.

Had a qualitative evaluation been made, it would have taken into consideration (1) that the disciplinary proceeding had not even come into being for nearly two years after the alleged basis for the charges had become fully available to the Board of Regents; (2) that with the granting of the first adjournment (whose rightness is undisputed) the Summer season of 1964 was almost at hand so that an adjournmen to the Fall was by no means abnormal; (3) that when the adjourned Fall date arrived petitioner's counsel requested a relatively short additional time because he absolutely had to; (4) that on the final "ultimatum" day (September 29, 1964) petitioner's counsel gave the Grievance Subcommittee the most solemn kind of professional assurance that a lawyer can give that he would be ready within three weeks plus two days; (5) that there is not one word or other shred of remotest indication in this record that petitioner's counsel had the slightest motive of procrastination, it being undisputed and indisputable that his professional schedule and his requests for adjournment in this case were determined absolutely by the "*force majeure*" circumstances of his exceptionally laborious professional workload; (6) that—again, undisputedly and indisputably —petitioner's chosen counsel was uniquely qualified, and petitioner's practically frantic belief that he needed this particular lawyer deserved to be regarded sympathetically,

in view of the fact that this lawyer had represented petitioner from the outset of the troubles in 1961; and (7), perhaps most important of all, that so much was at stake for petitioner and so little was at stake for the State in this matter of the granting of one final short adjournment.

None of these overriding qualitative considerations—without which any "due process" analysis in this case is a sham—seem to have been discerned by the tribunals below. This is perhaps a tribute to the zeal and skill of the State Attorney General's office, but in this Court of Last Resort we know that the due process issue will be evaluated *de novo.*

We realize that this Court's declared concern in recent decades for maintaining constitutional standards as to the right of counsel has arisen in fact situations involving criminal prosecution. E.g., *Glasser* v. *United States,* 315 U.S. 60; *Chandler* v. *Fretag,* 348 U.S. 3; *Gideon* v. *Wainwright,* 372 U.S. 335. Whether or not our claim of denial of the right to counsel in the instant case may technically be formulated in Sixth Amendment terms, there can be no doubt that an issue of Federal due process is presented when the constitutionally protected right of licensed medical practice* is abridged by an unjustified denial of the right to counsel of one's choice in a disciplinary hearing; the due process point stands *a fortiori,* of course, when as here the disciplinary "trial" was conducted wholly ex parte. Cf. also the decisions which recognize that it is part of the right to counsel that a defendant be allowed a rea-

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* The authorities on the constitutionally protected character of this right are collected in the Annotations in 98 L. Ed. 851, 6 L. Ed. 2d 1328. See also *Davis On Administrative Law* (1st Ed. 1951), pp. 250 *et seq.*

sonable time and reasonable continuances so that he may be represented by counsel of his own choice. *Chandler* v. *Fretag, supra; United States* v. *Johnston,* 318 F. 2d 288 (C.A. 6 1963); *Williams* v. *United States,* 332 F. 2d 36 (C.A. 7 1964). And cf. 112 A.L.R. 593 (*"Right to Continuance Because Counsel is in Attendance at Another Court"*).

It is worth remembering also that the New York statute under which the within disciplinary proceedings were had (N.Y. Education Law §6415, par. 4—quoted in Appendix D hereto *infra*) expressly assures the right of counsel. Denial of that right in the circumstances here presented was a denial of the equal protection of the laws under the Fourteenth Amendment. Cf. the discussion of the statutory right to counsel involved in *Backer* v. *C.I.R.,* 275 F. 2d 141, 144 (C.A. 5 1960), where the constitutional overtones of such a statutory provision are noted.

It may also be not inapt to suggest that since the within disciplinary proceedings involve in the most classic sense both a penalty and a forfeiture, the constitutional reasoning which makes the privilege against self-incrimination applicable to cases of penalty or forfeiture* should be analogously invoked with respect to the Sixth Amendment right to counsel.

Finally, since Dr. Ciofalo expressly told the Grievance Subcommittee on September 29 that his attorney had instructed him not to participate in the trial if the adjournment were refused and the trial proceeded, we respectfully refer to *Henry* v. *Mississippi,* U.S. , 13 L. Ed. 2d 408, 415, where the Court gave at least a qualified recogni-

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* *Lees* v. *United States,* 150 U.S. 480; *Boyd* v. *United States,* 116 U.S. 634.

tion to an individual's right to assert a constitutional claim notwithstanding that conduct of alleged waiver had occurred as the result of trial strategy adopted by counsel, citing *Whitus* v. *Balkcom*, 333 F. 2d 496 (C.A. 5 1964).

It is therefore respectfully urged that, by reason of the importance and novelty of the constitutional due process issue here presented as to the right of reasonable opportunity of professional practitioners in disciplinary proceedings to have available the services of counsel of their choice, not to say by reason of the sheer injustice, harshness and destructiveness of the due process violation here, this is a deserving case for the exercise of this Court's sparingly used certiorari jurisdiction.

## CONCLUSION

**It is respectfully submitted that this petition for a writ of certiorari should be granted.**

Respectfully submitted,

MAURICE EDELBAUM
*Attorney for Petitioner*
*Frank Ciofalo*

[APPENDICES FOLLOW]

## APPENDIX A

### Order of the Court of Appeals of New York Denying Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of June A.D. 1965.

Present,

HON. CHARLES S. DESMOND,
*Chief Judge, presiding.*

Mo. No. 561

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In the Matter of

the Application of Frank Ciofalo, M.D.,

Appellant,

For an Order &c.

vs.

The Board of Regents of the University of the State of New York,

Respondent.

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A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having

been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A COPY

GEARON KIMBALL
Deputy Clerk

## APPENDIX B

### Order and Judgment of Appellate Division Confirming Determination of Board of Regents

AT a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Courthouse in the City of Albany, New York, commencing on the 8th day of March, 1965.

PRESENT:

HON. JAMES GIBSON,

Presiding Justice,

HON. J. CLARENCE HERLIHY,
HON. WALTER B. REYNOLDS,
HON. FELIX J. AULISI,
HON. HERBERT D. HAMM,

Associate Justices.

No. 7552

In the Matter of the Application of FRANK CIOFALO,

Petitioner,

For an Order and Review under Article 78 of the Civil Practice Law and Rules and Section 6515 of the Education Law,

—against—

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

This proceeding having been instituted in this Court pursuant to Article 78 of the Civil Practice Law and Rules and

*Appendix B—Order and Judgment of Appellate Division Confirming Determination of Board of Regents*

Section 6515 of the Education Law, upon the petition of Frank Ciofalo, verified the 14th day of January, 1965, the answer and return of the respondent, verified the 26th day of January, 1965, and a record having been served and filed together with briefs of the respective parties herein, and the matter having been submitted to this Court by Maurice Edelbaum, attorney for petitioner, with Frederick S. Abrams, of counsel, and by Robert L. Harrison, Assistant Attorney General, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, attorney for respondent, on March 11, 1965, and due deliberation having been had thereon, and the Court having rendered a decision on the 6th day of May, 1965, it is hereby

ORDERED AND ADJUDGED that the determination be and hereby is confirmed and the petition dismissed, without costs.

ENTER:

/s/ John J. O'Brien
Clerk

ENTERED: May 13, 1965

A TRUE COPY

/s/ John J .O'Brien
Clerk

# APPENDIX C

## Opinion of Appellate Division Confirming Determination of Board of Regents

SUPREME COURT

APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

May 6, 1965 7552

In the Matter of

FRANK CIOFALO,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

*Per Curiam.* Proceeding under CPLR article 78 to review a determination of the Board of Regents which revoked the petitioner's license to practice medicine pursuant to the permissive provisions of subdivision 2 of section 6514 of the Education Law. The charges contain two specifications which charge in substance: (1) that the petitioner has been convicted of a crime in a court of competent jurisdiction within the meaning of section 6514 (subd. 2, par. [b]) of the Education Law in that, charged with twenty-six counts of abortion as a felony and one count of at-

tempted abortion, he entered a plea of guilty under the twenty-seventh count of the indictment (attempted abortion) to the misdemeanor of assault in the third degree, and (2) that the petitioner undertook and engaged to perform criminal abortions within the purview and meaning of section 6514 (subd. 2, par. [e]) of the Education Law in that the petitioner performed abortions upon four named persons. As to the first specification, the conviction, which is undisputed, must be regarded as an admission of some unlawful physical or medical procedure in relation to a pregnant woman named in the indictment, which was received in evidence at the hearing (*Matter of Jones* v. *Allen,* 4 A D 2d 994). As to the second specification, there was direct and substantial evidence of abortions performed upon the four persons named. Giving due consideration to the prior reputation of the petitioner, the measure of discipline imposed is not so disproportionate to the offenses established as to warrant the substitution of our judgment for that of the administrative agency (cf. *Matter of Stolz* v. *Board of Regents,* 4 A D 2d 361; *Matter of Leavitt* v. *Board of Regents,* 9 A D 2d 987) and we do not find a basis in the record for determining that the discipline should be different from that which the Regents have imposed on recommendation of the Medical Committee on Grievances.

The petitioner contends also that the "refusal of the Board of Regents to grant a continuance (adjournment) under the circumstances violated petitioner's rights to due process." The hearing originally was scheduled for May 13, 1964. The petitioner requested and obtained an adjourn-

ment to June 9, 1964. On June 9, 1964, the petitioner requested an adjournment "to the fall". The request was granted and thereafter the petitioner was informed through his counsel that the new date for the hearing was September 15, 1964. However, on June 9 the Chairman of the Subcommittee on Grievances directed that the hearing would be required to proceed on the date to be fixed in September and that the petitioner should engage other counsel if his counsel was otherwise engaged at that time. On September 15 a further adjournment was requested. The Chairman of the Subcommittee postponed the hearing to September 29, 1964, but made a further repetitive direction that the hearing be held on that date regardless of the petitioner's position or his "attorney's position" and added: "We are going to have the hearing on the 29th regardless of whether or not you people represent the Respondent [the instant petitioner]." On September 29 the petitioner's attorney through an associate presented an affidavit of engagement and asked for a further adjournment. The adjournment was denied as to the witnesses present but the associate counsel was advised that the witnesses on behalf of the petitioner might be produced at a later date. This offer was declined. As to the petitioner's contention that refusal to grant a fourth adjournment deprived him of due process, comment, in the light of the circumstances, would seem unnecessary.

Determination confirmed, and petition dismissed, without costs.

GIBSON, P.J., HERLIHY, REYNOLDS, AULISI and HAMM, JJ., concur.

# APPENDIX D

## Pertinent Provisions of the New York Education Law, §§6514 and 6515

§6514 *Revocation of certificates; annulment of registrations.*

* * * * *

2. The license or registration of a practitioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

* * * * *

(b) That a physician, osteopath or psysiotherapist has been convicted in a court of competent jurisdiction, either within or without this state, of a crime; or

* * * * *

(e) That a physician, osteopath or psysiotherapist did undertake or engage in any manner or by any ways or means whatsoever to perform any criminal abortion, or to procure the performance of the same by another or to violate section eleven hundred forty-two of the penal law, or did give information as to where or by whom such a criminal abortion might be performed or procured.

§ 6515. *Procedure in disciplinary proceedings against a physician or osteopath*

1. The committee on medical grievances shall be continued. Such committee shall consist of at least ten members who shall be appointed by the regents on the recom-

mendation of the commissioner, plus such additional members as the regents shall determine. * * *.

2. * * * Each member of such committee shall be a duly licensed physician of this state.

3. * * * The committee * * * shall meet at such times as the chairman shall designate.

4. The members of such committee shall have jurisdiction to hear all charges against duly licensed physicians and osteopaths of this state for violation of the provisions of section sixty-five hundred fourteen hereof, except subdivision one, and upon such hearing such committee shall determine such charges upon their merits, and the department may, after due notice and hearing, upon the receipt from such committee of the record, findings and determination of such committee wherein and whereby such practitioner has been found guilty, revoke and annul his license, annul his registration, suspend him from practice, or reprimand or otherwise discipline him. Proceedings against any practitioner under this section shall be begun by filing a written charge or charges against the accused. Such charges may be preferred by any person, corporation or public officer, and they shall be filed with the secretary of the committee on grievances and such secretary shall forward to the executive officer of the department a copy of such charges in all cases in which such committee or a subcommittee thereof shall deem a trial necessary. The chairman of such committee, when charges are preferred, may designate three or more of the members of such committee, including, whenever possible, at least one member who repre-

sents the same school of practice as the physician or osteopath against whom the charges are preferred to hear and report upon such charges to such committee. The time and place of the hearing of such charges shall be fixed by the committee as soon as convenient and a copy of the charges, together with a notice of the time and place when they will be heard shall be served upon the accused or his counsel at least ten days before the date actually fixed for such hearing. Where personal service or service upon counsel after due diligence cannot be effected and such fact is certified on oath by any person duly authorized to make legal service, the committee shall cause a copy of such notice to be mailed to the accused by certified or registered mail at his last known address at least fifteen days prior to the date of the hearing. All such notices of hearing of charges shall contain a plain and concise statement of the material facts without unnecessary repetition, but not the evidence by which the charges are to be proved with a notification that a stenographic record of such proceedings will be kept, and that the accused will have opportunity to appear either personally or by counsel at the hearing, with the right to produce witnesses, and evidence upon his own behalf, to cross-examine witnesses to examine such evidence as may be produced against him and to have subpoenas issued by the committee. Such subcommittee to whom such charges were referred shall make a written report of findings and recommendations and the same shall be forthwith transmitted to the secretary of the committee on grievances, with a transcript of the evidence. Said grievance commit-

tee may thereupon act upon such recommendation as it shall deem fit, or may take further testimony if the same shall seem desirable in the interest of justice. Thereupon the committee shall determine such charges upon their merits (the vote of each member of such committee present to be recorded as part of the committee's findings). If by unanimous vote of the members present the practitioner is found guilty of such charges or any of them, the committee shall transmit to the department the record, findings and determination wherein and whereby such practitioner has been found guilty, and their recommendation, and the regents after due hearing shall in their discretion execute an order accepting or modifying such determination of the committee as hereinabove provided. If the practitioner is found not guilty, the committee shall order a dismissal of the charges, and the exoneration of the accused.

Nothing herein contained shall estop the department from initiating proceedings in any case.

5. Any licensed practitioner found guilty under the provisions of this section, or whose license is otherwise revoked or suspended or registration annulled, or who has been refused registration, or who is otherwise reprimanded or disciplined under this article may institute a proceeding under article seventy-eight of the civil practice law and rules for the purpose of reviewing such determination returnable before the appellate division of the third judicial department, but no such determination shall be stayed or enjoined except upon application to such appellate division, after notice to the attorney-general. The commit-

tee on grievances or any member thereof may issue subpoenas and administer oaths in connection with any hearing or investigation under this article and it shall be the duty of such committee to issue subpoenas at the request of and upon behalf of the defense. The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain the same. The department shall furnish legal advice and assistance to the committee whenever such service is requested.

* * * * *

10. Such committee shall have power to make such rules and regulations for the conduct of its business as it shall deem necessary, provided such rules and regulations do not conflict with any of the provisions of this article.